

**IN THE GENERAL SESSIONS COURT FOR KNOX COUNTY, TENNESSEE
MISDEMEANOR DIVISION**

**IN RE: PETITION OF
KNOX COUNTY PUBLIC DEFENDER**

FILED
MAR 26 2008
By MARTHA PHILLIPS, Clerk

Docket No. _____

**SWORN PETITION TO SUSPEND APPOINTMENT OF THE DISTRICT PUBLIC
DEFENDER TO DEFENDANTS IN THE KNOX COUNTY GENERAL SESSIONS COURT,
MISDEMEANOR DIVISION**

- I. Requested Relief and Reasons Therefor—the Knox County Public Defender seeks the least disruptive, most cost efficient solution to a caseload/workload crisis that exists in that office.**

Pursuant to Tennessee Supreme Court Rule 13, Section 1(e)(4)(D), Mark Stephens, Sixth Judicial District Public Defender ("Public Defender"), through counsel, petitions this Court to suspend appointments of the Public Defender's Office ("P.D. Office" or "Office") to represent defendants in the Knox County General Sessions Court, Misdemeanor Division ("Knox County General Sessions Court, Misdemeanor Division" or "Misdemeanor Division"). In support of this petition, the Public Defender avers as follows:

1. The current workload of the P.D. Office in the Felony and DUI Divisions of the Knox County General Sessions Court, as well as Divisions I and II of the Criminal Court for Knox County and the Knox County Juvenile Court, is so excessive that, if the fourteen P.D. lawyers assigned to those Divisions of the Court are required to continue to accept new appointments, they will not be able to provide effective representation to their existing clients and to newly appointed clients in accordance with constitutional and professional standards. These standards are based on the Sixth Amendment to

a. The potential for a person charged with a crime or crimes in Knox County General Sessions Court, Misdemeanor Division to face incarceration is generally less than that for an individual charged with a crime or crimes in other Divisions of the Sessions Court or in the Criminal Courts;

b. The most frequently prosecuted offenses in the Misdemeanor Division do not involve physical injury to third persons. Typically, these offenses involve driver's license infractions, bad-check charges, petty thefts, or public nuisances. Consideration for third-party victims is thus less critical than in Courts in which individuals are charged with crimes involving physical injury to persons;

c. More cases are resolved in the Misdemeanor Division than in the DUI or Felony Divisions. In the DUI and Felony Divisions, a higher percentage of cases are bound to the Grand Jury, where, after indictment, they go to one of the three divisions of Knox County Criminal Court.

In contrast, suspension of appointments in the Felony or DUI Divisions would result in the P.D. Office having a significantly larger number of DUI and felony cases with which the Office would not be familiar by having been involved with those cases in Sessions Court. This would create further inefficiencies since the P.D. lawyers would not have ready access to the work product in the files from the proceedings at the Sessions Court level. This would cause delays and create additional expense because the judges in the Criminal Courts would be required to appoint counsel after the cases have moved through the Grand Jury.

If P.D. lawyers are not engaged in representation of citizens charged with offenses in the DUI and Felony Divisions, dual appointment of counsel will result because judges in the DUI and Felony Divisions will be required to appoint private counsel. If the Criminal Court then appoints the P.D. Office as successor counsel, the P.D. lawyer will not have had the benefit of working on the case at the Sessions Court level. This will inevitably result in delay and additional expense to the State;

d. When the P.D. Office is so overwhelmed by excessive caseloads that it is not available to serve as counsel for those citizens who are constitutionally eligible for appointed counsel in the Misdemeanor Division of the Knox County General Sessions Court, the State is legally obligated to provide those individual defendants with representation. The State must compensate private lawyers who provide this service. The cost to the State to provide legal counsel is less in the Misdemeanor Division than in the other Divisions of General Sessions Court or in Criminal Court. The remedy that the P.D. Office seeks in this Petition is the least expensive remedy for the State and will provide the constitutionally required effective assistance of counsel to which defendants are entitled.

II. Statement of Facts

A. Excessive caseloads/workloads in the Public Defender Office have forced the Office to implement a less efficient and more costly representation model known as horizontal representation.

3. Currently the P.D. Office has a legal staff of twenty-two lawyers plus the elected Public Defender. Eighteen of those lawyers are compensated through state funds. Five are compensated through local funds. The Office provides legal representation to indigent citizens charged with crimes in seven local courts: three divisions of Criminal Court; three divisions of Sessions Court; and Juvenile Court. In addition, the Office provides legal representation at the appellate level before the Tennessee Court of Criminal Appeals and the Tennessee Supreme Court.

4. Because of current caseloads and staffing in the P.D. Office, the office has not been able to implement vertical representation, the preferred representation model. Under a vertical representation model, an assistant public defender is assigned to a particular client at the time the public defender's office is appointed. That assistant public defender then represents that client throughout the legal process until the client's case is concluded. A vertical representation model generally allows the lawyer an opportunity to establish a better professional relationship with the client. This model promotes

efficiency. It allows the lawyer to have a better understanding of the client and to develop a better grasp of the facts of the case and the legal issues those facts present. It also allows the lawyer to bring the case to a fair resolution in a more expeditious manner.²

5. A vertical representation model requires reasonable caseloads and adequate legal staff. The current Knox County P.D. caseloads make it not feasible to implement vertical representation. The horizontal representation model that excessive caseloads have forced the P.D. Office to adopt necessarily results in changes in assigned counsel over the life of the case. Under this model, lawyers are assigned to courts first and to clients second. As cases move through various courts, public defenders assume responsibility for clients only as long as their cases remains in the lawyers' assigned courts. The interruption of the attorney-client relationship results in inefficiencies, as attorneys new to the case and to the client must learn substantive and procedural aspects of the case that prior counsel likely has already grasped. Despite its shortcomings, the horizontal representation model is necessary when caseloads are as high as those currently existing in the P.D. Office.

B. In a horizontal representation model, lawyers serve courts first and the client second, which negatively impacts the attorney-client relationship and promotes delay.

6. The Knox County P.D. Office currently assigns lawyers to courts as follows:

General Sessions Court--Felony Division	5
General Sessions Court--DUI Division	2
General Sessions Court--Misdemeanor Division	6
Criminal Court, Division I	2
Criminal Court, Division II	3
Criminal Court, Division III	2
Juvenile Court	2
Total	22

² The Tennessee Supreme Court has arguably expressed a preference for the vertical representation model. As Tennessee Supreme Court Rule 13, Section 1(e)(5) states, "[a]ppointed counsel shall continue to represent an indigent party *throughout the proceedings*, including any appeals, until the case has been concluded or counsel has been allowed to withdraw." (emphasis added). This language certainly recognizes the value that continuity of representation brings to a client's case.

Of these 22 lawyers, one lawyer has not yet been licensed to practice law in Tennessee and is limited to practicing under supervision pursuant to Tennessee Supreme Court Rule 10. Three other lawyers have received their law licenses only within the last four months. Two additional lawyers on staff have been licensed to practice less than one year. In sum, nearly one third of the P.D. Office attorneys either have been practicing less than one year or have not yet received a license to practice law.

7. Seven P.D. Office lawyers are assigned to the three divisions of Criminal Court. As of January 2008, those seven lawyers currently have 544 total clients in Criminal Court. Of those, 286 cases are set for trial. Of the 286 cases, 235 are felony charges while 51 are misdemeanor charges. Nearly three-quarters of the 286 cases are set for trial within the next 90 days.

While the excessive caseload problem existing in the P.D. Office is most acute in the Felony and DUI Divisions of General Sessions Court, Divisions I and II of the Criminal Court, and the Juvenile Court, moving P.D. lawyers currently assigned to Division III of the Criminal Court to Sessions Court would result in a crisis in Division III. Likewise, if the P.D. Office moved lawyers from the Misdemeanor Division of General Sessions Court, while continuing to accept appointments in the Misdemeanor Division, it would result in a crisis situation in that court and would put lawyers in both courts in the position of not being able to continue to provide effective assistance of counsel to existing clients.

ABA Formal Ethics Opinion 06-441, discussed in more detail below, states that a lawyer's primary ethical duty is owed to existing clients. Therefore, a lawyer must decline to accept a new case, rather than withdraw from existing cases, if the acceptance of the new case will result in her workload becoming so excessive that she is unable adequately to represent all her clients. Ethics Opinion 06-441 states that, when an existing workload becomes excessive, the lawyer "must reduce it to the extent that what remains to be done can be handled in full compliance with the Rules."

- C. While P.D. caseloads/workloads are typically measured by counting "cases," in many ways, "filings" are a more accurate measure of the workload—certainly for non-legal essential support staff.

8. Section 16-1-117 of the Tennessee Code establishes the definition of a "case." It states:

A criminal case in a court of record, except juvenile court, shall be defined and reported as a single charge or set of charges arising out of a single incident involving the same victim or victims concerning a defendant in one (1) court proceeding. An incident shall be all criminal activity occurring within a 24-hour period. A court proceeding refers to a single level of court, (i.e., General Sessions, Circuit, Appeals or Supreme Court). An appeal, probation revocation or other post-judgment proceeding shall be considered a separate case. This definition shall not alter the practice and the Tennessee Rules of Criminal Procedure dealing with joinder and severance of criminal cases. Charges of a related nature shall be defined as charges against a single defendant that may have more than one (1) victim and that are similar such as, but not limited to: burglaries, drug offenses, or serial rape. Worthless check cases shall be defined and reported as all worthless checks filed by the same affiant against the same defendant within a 24-hour period with each check counted as a separate charge. District attorneys general shall treat multiple incidents as a single incident for purposes of this statute when the charges are of a related nature and it is the district attorney general's intention that all of the charges be handled in the same court proceeding. If a case has more than one charge or count, then the Administrative Office of the Courts shall count the case according to the highest class of charge or count at the time of filing or disposition for the weighted caseload study based on the formula set out in § 16-2-513(a).

Tenn. Code Ann. § 16-1-117(a)(1).

In 1999, the Tennessee legislature required that a weighted caseload study be performed for all components of the Tennessee Criminal Justice System—Judicial, District Attorney General's Conference, and District Public Defender's Conference—for the purpose of determining staffing needs ("Weighted Caseload Study"). The legislature required that the Weighted Caseload Study use the definition of "case" as set out above.

The Spangenberg Group ("TSG" or "Spangenberg"), a nationally recognized research and consulting firm specializing in improving justice programs, designed and conducted the Weighted

Caseload Study for the Tennessee District Public Defender's Conference. TSG has conducted research and provided technical assistance to justice organizations in every state in the nation. In designing the Weighted Caseload Study, TSG assigned weights to levels of cases to determine the appropriate level of full-time equivalent (FTE) positions to handle the workload within public defender offices. TSG weighted offenses based on offense level and complexity, recognizing that a more serious case (e.g., homicide) requires more of a lawyer's time and office resources than a less serious charge (e.g., misdemeanor theft).

9. The P.D. Office case management system maintains its caseload/workload data in the form of "filings" or "charges" rather than "cases" as defined by statute.³

10. Because of Spangenberg's familiarity with Tennessee criminal justice data and the Weighted Caseload Study, the Knox County P.D. Office asked TSG to review its caseload "filings" data and to analyze that data using the methodology of the Weighted Caseload Study.⁴ In the Weighted Caseload Study, TSG established recommended caseload standards for Tennessee Public Defender Offices that are different from, and higher than, other published national standards.⁵

(a) For fiscal year 2006, new appointments or "filings" in all divisions of the Knox County General Sessions Courts for the P.D. Office were as reported as follows:

General Sessions Court--Felony Division	6,864
General Sessions Court--DUI Division	3,334
General Sessions Court--Misdemeanor Division	<u>9,180</u>
TOTAL	19,378

³ Each warrant, indictment, presentment, information, petition, or citation constitutes a "filing." The distinction between "filings" and "cases" may be best illustrated by the following example: If a client is stopped by the police and charged with driving while intoxicated and driving on a revoked license, that would constitute two "filings" but one "case."

⁴ TSG analyzed FISCAL YEAR 2006 P.D. Office data in the summer and fall of 2007. Their work was done pro bono. Fiscal year 2007 data was not available at that time. See 08/01/07 TSG worksheet attached as Exhibit 1 to Petition.

⁵ The TSG Tennessee caseload standards, as well as other national standards, are discussed in more detail beginning in paragraph 26.

When grouped pursuant to the definition in T.C.A. § 16-1-117, those 19,378 new appointments or "filings" in the Knox County General Sessions Courts constituted the following number of new "cases":

General Sessions Court--Felony Division	4,096
General Sessions Court--DUI Division	1,582
General Sessions Court--Misdemeanor Division	<u>6,350</u>
TOTAL	12,028

In its study, TSG concluded that during fiscal year 2006, the P.D. Office was appointed to 12,028 new "cases" in all divisions of the Knox County General Sessions Courts. In the Misdemeanor Division alone there were 6,350 new "cases" (or 9,180 "filings").

(b) During fiscal year 2006, the disposed "filings" in all divisions of the Knox County General Sessions Court for the P.D. Office were reported as follows:

General Sessions Court--Felony Division	6,397
General Sessions Court--DUI Division	3,090
General Sessions Court--Misdemeanor Division	<u>8,956</u>
TOTAL	18,443

When grouped pursuant to T.C.A. § 16-1-117, the 18,443 disposed "filings" in the Knox County General Sessions Court constituted disposed "cases" as follows:

General Sessions Court--Felony Division	3,842
General Sessions Court--DUI Division	1,516
General Sessions Court--Misdemeanor Division	<u>6,194</u>
TOTAL	11,552

TSG concluded that during fiscal year 2006, the P.D. Office disposed of 11,552 "cases" in all divisions of the Knox County General Sessions Courts.

(c) For fiscal year 2006, new appointments or "charges" in all divisions of the Knox County Criminal Courts for the P.D. Office were reported as follows:

Knox County Criminal Court - Division I	1,507
Knox County Criminal Court - Division II	1,488
Knox County Criminal Court - Division III	<u>1,383</u>

TOTAL 4,378

When grouped pursuant to the definition in T.C.A. § 16-1-117, the 4,378 new appointments or "charges" in those courts constituted the following number of new "cases":

Knox County Criminal Court - Division I	543
Knox County Criminal Court - Division II	652
Knox County Criminal Court - Division III	<u>619</u>
TOTAL	1,814

(d) During fiscal year 2006, disposed "charges" in all divisions of the Knox County Criminal Court for the Public Defender Office were reported as follows:

Knox County Criminal Court - Division I	1,246
Knox County Criminal Court - Division II	1,204
Knox County Criminal Court - Division III	<u>1,331</u>
TOTAL	3,781

When grouped pursuant to the definition in T.C.A. § 16-1-117, the 3,781 disposed charges in those courts constituted disposed "cases" as follows:

Knox County Criminal Court - Division I	502
Knox County Criminal Court - Division II	563
Knox County Criminal Court - Division III	<u>607</u>
TOTAL	1,672

(e) For fiscal year 2006, new appointments or "filings" in the Knox County Juvenile Court were reported as follows:

Knox County Juvenile Court	1,900
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When grouped pursuant to the definition in T.C.A. § 16-1-117, the 1,900 new appointments or "filings" constituted the following number of new "cases":

Knox County Juvenile Court	1,398
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(f) During fiscal year 2006 disposed "filings" in the Knox County Juvenile Court for the Public Defender Office were reported as follows:

Knox County Juvenile Court	1,635
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When grouped pursuant to the definition in T.C.A. § 16-1-117, the 1,635 disposed "filings" in the Knox County Juvenile Court constituted disposed "cases" as follows:

Knox County Juvenile Court	1,178
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11. As stated earlier, because of TSG's familiarity with Tennessee criminal justice data and the Weighted Caseload Study, the P.D. Office asked TSG to review its caseload "filings" and "charge" data and to analyze that data using the methodology of the 1999–2000 study. TSG provided the fiscal year 2006 P.D. Office data analysis pro bono. Issac Merkle, Director of the Public Defender's Information Technology Department, worked closely with TSG—particularly with Mr. David Newhouse—in an effort to understand the data analysis methodology used by TSG. Following the investment of considerable time experimenting with different approaches, by incorporating methodological details supplied by Mr. Newhouse, Mr. Merkle developed a sufficient understanding of the data analysis methodology so that he could generate statistics comparable to those generated by Mr. Newhouse and TSG.⁶ The results of Mr. Merkle's calculations for fiscal year 2007 are as follows:

(a) For fiscal year 2007, new appointments or "filings" in all divisions of the Knox County General Sessions Courts for the Public Defender's Office were calculated by Issac Merkle as follows:

General Sessions Court--Felony Division	6,410
General Sessions Court--DUI Division	4,250
General Sessions Court--Misdemeanor Division	<u>9,171</u>
TOTAL	19,831

When grouped pursuant to the definition in T.C.A. § 16-1-117, the 19,831 new appointments or "filings" in the Knox County General Sessions Courts constituted the following number of new "cases":

General Sessions Court--Felony Division	3,330
General Sessions Court--DUI Division	1,701
General Sessions Court--Misdemeanor Division	<u>5,760</u>
TOTAL	10,791

⁶ See affidavit of Mr. Issac Merkle attached as Exhibit 2 to this Petition.

The P.D. Office concluded that, during fiscal year 2007, the office was appointed to 10,791 new "cases" in all divisions of the Knox County General Sessions Courts. In the Misdemeanor Division alone there were 5,760 new "cases" (or 9,171 "filings").

(b) During fiscal year 2007, disposed "filings" in all divisions of the Knox County General Sessions Court for the Public Defender's Office were calculated as follows:

General Sessions Court--Felony Division	6,248
General Sessions Court--DUI Division	3,741
General Sessions Court--Misdemeanor Division	<u>8,478</u>
TOTAL	18,467

When grouped pursuant to T.C.A. § 16-1-117, the 18,467 disposed "filings" in the Knox County General Sessions Court constituted disposed "cases" as follows:

General Sessions Court--Felony Division	3,248
General Sessions Court--DUI Division	1,553
General Sessions Court--Misdemeanor Division	<u>5,347</u>
TOTAL	10,148

The P.D. Office concluded that, during fiscal year 2007, the office disposed of 10,148 "cases" in all divisions of the Knox County General Sessions Courts.

(c) For fiscal year 2007, new appointments or "charges" in all divisions of the Knox County Criminal Courts for the Public Defender Office were calculated as follows:

Knox County Criminal Court - Division I	1,311
Knox County Criminal Court - Division II	<u>1,108</u>
Knox County Criminal Court - Division III	<u>1,080</u>
TOTAL	3,499

When grouped pursuant to the definition in T.C.A. § 16-1-117, the 3,499 new "charges" in those courts constituted the following number of new "cases":

Knox County Criminal Court - Division I	428
Knox County Criminal Court - Division II	395
Knox County Criminal Court - Division III	<u>461</u>
TOTAL	1,284

(d) During fiscal year 2007, disposed "charges" in all divisions of the Knox County Criminal Court for the Knox County Public Defender Office were calculated as follows:

Knox County Criminal Court - Division I	1,173
Knox County Criminal Court - Division II	1,219
Knox County Criminal Court - Division III	<u>1,297</u>
TOTAL	3,689

When grouped pursuant to the definition in T.C.A. § 16-1-117, the 3,689 disposed charges in those courts constituted disposed "cases" as follows:

Knox County Criminal Court - Division I	388
Knox County Criminal Court - Division II	406
Knox County Criminal Court - Division III	<u>493</u>
TOTAL	1,287

(e) For fiscal year 2007, new appointments or "filings" in the Knox County Juvenile Court were calculated as follows:

Knox County Juvenile Court	1,749
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When grouped pursuant to the definition in T.C.A. § 16-1-117, the 1,749 new appointments or "filings" constituted the following number of new "cases:"

Knox County Juvenile Court	1,169
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(f) During fiscal year 2007 disposed "filings" in the Knox County Juvenile Court for the Public Defender Office were calculated as follows:

Knox County Juvenile Court	1,558
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When grouped pursuant to the definition in T.C.A. § 16-1-117, the 1,558 disposed "filings" in the Knox County Juvenile Court constituted disposed "cases" as follows:

Knox County Juvenile Court	1,047
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These caseloads/workloads in General Sessions Court and Divisions I and II of Criminal Court, as well as in Juvenile Court, are substantially more than the P.D. lawyers in those courts can continue to

handle and provide effective assistance of counsel that meets constitutional and professional standards. Moreover, while these caseload numbers are the best *empirical* indication of the workloads that P.D. Office lawyers are carrying, authoritative commentary on caseload standards, including ABA Ethics Opinion 06-441, discussed below, recognizes that other factors also contribute to the excessiveness of a lawyer's caseload. Although two lawyers might have about the same number of "cases," those lawyers' workloads might be vastly different. The number and difficulty of the tasks that an attorney is required to perform in a particular case vary depending on the unique nature and complexity of each case. While some cases are fairly straightforward, others involve thorny legal and factual issues that require a great deal more of an attorney's time than would a case of "average complexity."

12. When TSG analyzed the caseloads for fiscal year 2006 for the P.D. Office, comparing dispositions per attorney with the weighted caseload standards, it concluded that the Knox County P.D. Office needed an additional sixteen attorneys to handle the caseload.⁷ In 2006, the P.D. Office was operating at 58% of attorney resources needed to meet the Weighted Caseload Study staffing recommendation. Applying this same type of statistical analysis to the fiscal year 2007 data, the Knox County P.D. Office needs an additional 10.6 attorneys. In other words, the P.D. Office in fiscal year 2007 is operating at 68% of attorney resources needed to meet the Weighted Caseload Study staffing recommendation.⁸

⁷ See TSG's FTE Calculations attached as Exhibit 3 to this Petition.

⁸ See Issac Merkle's FTE Calculations attached as Exhibit 4 to this Petition.

III. The Right to Counsel

A. The Constitutions of the United States and Tennessee guarantee an accused citizen charged with a crime the right to the assistance of counsel.

13. Both the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution guarantee a criminally accused defendant the right to be represented by counsel. *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975).

14. The United States Supreme Court has interpreted the Sixth Amendment to require the appointment of counsel in any state or federal criminal prosecution that leads or may lead to imprisonment for any period of time. *See Alabama v. Shelton*, 535 U.S. 654, 662 (2002); *Strickland v. Washington*, 466 U.S. 668, 684–86 (1984); *Scott v. Illinois*, 440 U.S. 367, 373–74 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 30–31 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 342–45 (1963); *Johnson v. Zerbst*, 304 U.S. 458, 462–63 (1938).

B. Tennessee statutes and court rules implement the right to counsel for indigent defendants in Tennessee.

15. An accused who cannot afford to employ an attorney is entitled to have the court appoint counsel. The legislature has implemented this right in section 40-14-103 of the Tennessee Code and related statutes. The procedure set up by these statutes requires the court to examine the defendant's financial circumstances in relation to the charged offense to determine if the defendant is unable to

afford counsel. If the court so finds, the court must appoint either the public defender or a competent attorney licensed in this state to represent that defendant. Tenn. Code Ann. §§ 8-14-205; 40-14-103, -202.

16. The legislature has addressed the process of appointing counsel in title 8 of the Tennessee Code, through which it created the district public defender system. *See* Tenn. Code Ann. §§ 8-14-201 to -212. The statute provides that “[i]f the court determines that the person is indigent, as defined in § 8-

14-201, and the person has not waived the right to counsel, the court *shall* make and sign an order appointing the district public defender, or such other appointed counsel as provided by law, to represent the person." § 8-14-205(d) (emphasis added).

17. The legislature authorized the Tennessee Supreme Court to "adopt other rules with regard to the accomplishment of the purposes of [Title 40, Chapter 14, Part 2] as it deems appropriate in the public interest." § 40-14-206. Under this authority, the Tennessee Supreme Court adopted Rule 13 to provide for the appointment of counsel in all proceedings in which an indigent party has a statutory or constitutional right to appointed counsel.

18. Rule 13 provides that when appointing counsel for an indigent defendant the court should appoint the district public defender's office if it is qualified and no conflict of interest exists, "unless in the sound discretion of the trial judge appointment of other counsel is necessary." Sup. Ct. R. 13, § 1 (e)(4)(A). "The court shall not make an appointment [of the district public defender's office] if counsel makes a clear and convincing showing that adding the appointment to counsel's current workload would prevent counsel from rendering effective representation in accordance with constitutional and professional standards." Sup. Ct. Rule 13, § 1 (e)(4)(D). The Knox County P.D. Office is prepared to make that clear and convincing showing.

C. The constitutional right to counsel also guarantees the right to the effective assistance by counsel.

19. Both the United States and Tennessee Supreme Courts have recognized that the right to representation by counsel encompasses the right to "reasonably effective" assistance that is within the range of competence demanded of attorneys in criminal cases. *See Strickland v. Washington*, 466 U.S. 688, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). In *Baxter*, the Tennessee Supreme Court held that "[the Sixth Amendment to the U.S. Constitution and Article I, Section 9 of the Tennessee Constitution] are identical in import with the result that a denial of

the Sixth Amendment right to the effective assistance of counsel is simultaneously a denial of the right to be heard by counsel, as provided under the Constitution of Tennessee." *Baxter*, 523 S.W.2d at 936.

IV. Effective Assistance of Counsel

20. When a court determines whether an attorney has rendered effective assistance of counsel to a particular defendant, the court almost always does so retrospectively. The jurisprudence of constitutionally effective assistance of counsel has developed almost entirely in the context of post-conviction proceedings in which defendants have challenged the sufficiency of the representation they received. After considering testimony about what the lawyer did or did not do, a court makes a legal finding whether the advice given or services rendered were within the range of competence demanded in criminal cases. Even if the court determines that the lawyer did not competently represent the defendant, however, the court must also determine whether that ineffective assistance prejudiced the defendant.

21. In contrast, Tennessee Supreme Court Rule 13, Section 1(e)(4)(D) requires an entirely prospective evaluation of whether a public defender can render effective assistance of counsel. As the rule states, "The court shall not make an appointment if counsel makes a clear and convincing showing that adding the appointment to counsel's current workload would prevent counsel from rendering effective representation in accordance with constitutional and professional standards." Sup. Ct. R. 13, § 1(e)(4)(D). This standard requires the individual public defender to make the required determination *prospectively* before agreeing to represent a newly appointed indigent defendant. If the lawyer believes that adding the appointment to her workload will cause her to render ineffective assistance to any of her clients, Rule 13 requires her to bring this to the attention of the court and to attempt to make the requisite clear-and-convincing showing. Because of the number of defendants that the Knox County P.D. Office is appointed to represent, it would be practically impossible to require each of the 22

assistant public defenders to attempt to make the showing required by Rule 13, § 1(e)(4)(D) for each new appointment on an individual basis. It is this practical impossibility that has led the Public Defender to petition this Court and to make the requisite showing on behalf of the assistant public defenders in his office.

22. In making the prospective determination whether "adding [an] appointment to counsel's current workload would prevent counsel from rendering effective representation in accordance with constitutional and professional standards," neither the court nor the public defender can take into account the prejudice standard that a court would apply in a post-conviction challenge to the adequacy of the representation. Instead, both the court and the public defender must look only to the duties that an attorney must perform to render effective assistance, and they must determine whether the public defender could fulfill those duties as to all clients if an additional defendant were added to the defender's workload. In the recent Tennessee Supreme Court decision, *Vaughn v. State*, 202 S.W.3d 106 (Tenn. 2006), the court discussed the standard for effective assistance of counsel:

We have never adopted an exhaustive list of criteria for counsel to satisfy in all cases. However, in *Baxter*, we cited with approval the duties and criteria set forth in the American Bar Association Standards for the Defense Function:

(1) Counsel should confer with his client without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable. Counsel should discuss fully potential strategies and tactical choices with his client.

(2) Counsel should promptly advise his client of his rights and take all actions necessary to preserve them. . . .

(3) Counsel must conduct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. . . . This means that in most cases a defense attorney, or his agent, should interview not only his own witnesses but also those that the Government intends to call, when they are accessible. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. And, of course, the duty to investigate also requires adequate legal

research. *Baxter*, 523 S.W.2d at 932-33 (quoting *United States v. DeCoster*, 159 U.S. App. D.C. 326, 487 F.2d 1197, 1203-04 (D.C. Cir. 1973)).]

Vaughn, 202 S.W.3d at 116.

The Tennessee Supreme Court has said that counsel's performance "will be measured by the duties and criteria" as set out in *United States v. DeCoster*, 487 F.2d 1197 (D.C. Cir. 1973) and *Beasley v. United States*, 491 F.2d 687 (6th Cir. 1974), and that counsel should be guided by the American Bar Association Standards relating to the Administration of Criminal Justice in general and specifically those parts that relate to the defense function. Thus, a Public Defender must prospectively evaluate whether, with her current caseload/workload, she will have sufficient time to fulfill the duties and criteria in *DeCoster* and *Beasley*. While not exhaustive, the duties include (a) conferring with the client without delay and as soon as is necessary to elicit matters of defense or to ascertain that the potential defenses are available; (b) discussing fully with the client potential strategies and tactical choices; (c) promptly advising the client of his rights and taking all action necessary to preserve them; (d) protecting the client's right against self-incrimination; (e) addressing with the client the issue of pre-trial release pending trial; (f) filing, where required, motions for pre-trial psychiatric examinations and for the suppression of evidence; (g) conducting appropriate investigations, both factual and legal, to determine what defenses can be developed; (h) interviewing or directing an agent to interview, defense witnesses and, where accessible, those the government intends to call; (i) securing information in possession of the prosecution and law enforcement authorities; and (j) doing necessary legal research.

23. During the last three years, 13 lawyers have resigned from the P.D. office to pursue the practice of law in other places. Over half of these lawyers had been licensed to practice law for more than ten years at the time of their departure. For the most part, the lawyers that have replaced these seasoned attorneys are new and have little or no experience in the practice of law. During the same

period, 9 non-lawyer, essential support staff also left the P.D. Office. The workloads/caseloads existing in the P.D. office are a significant factor in discouraging lawyers and non-lawyers who might otherwise wish to stay in the P.D. office.

24. If the Public Defender is not able to control the influx of new cases in the Misdemeanor Division of Knox County Sessions Court, excessive caseloads will create systemic deficiencies that will come to adversely affect the daily operation of public defense in a way that will violate the Sixth Amendment of the United States Constitution and Article I, Section 9 of the Tennessee Constitution.

A. Recognized caseload/workload standards have been established by government entities and national indigent defense organizations dating back to 1973.

25. In 1973, the National Advisory Commission (NAC) on Criminal Justice Standards and Goals was appointed by the Law Enforcement Assistance Administration⁹ and charged with the responsibility of formulating, for the first time, national criminal justice standards and goals for crime reduction and prevention at state and local levels. The NAC issued six extensive reports on a number of topics, including the criminal justice system and the courts, each developed by a separate task force. The reports set standards for the flow of cases through each stage of the criminal justice process as well as basic standards for each of the system's component parts, including courts, court administration, prosecution, and defense.

The NAC report, particularly Standard 13.12 – "Workload of Public Defenders," – has been regularly and consistently cited as the benchmark for determining appropriate caseloads for public

⁹ The Law Enforcement Assistance Administration (LEAA) was a Federal agency set up in 1968 to channel federal funding to state and local law enforcement agencies having Constitutional authority over most crimes. The agency created state planning agencies, funded educational programs, research, and a variety of local crime control initiatives. The LEAA was abolished in 1982.

defender organizations. Under Standard 13.12 the caseload¹⁰ of a particular public defender should not exceed the following:

- a. felonies per attorney per year: not more than 150;
- b. misdemeanors (excluding traffic) per attorney per year: not more than 400;
- c. juvenile court cases per attorney per year: not more than 200;
- d. mental health act cases per attorney per year: not more than 200;
- e. appeals per attorney per year: not more than 25.

Standard 13.12 mandates that "[i]f the public defender determines that because of excessive workload the assumption of additional cases or continued representation in previously accepted cases by his office might reasonably be expected to lead to inadequate representation in cases handled by him, he should bring this to the attention of the court." The standard clarifies that "[i]f the court accepts such assertions, the court should direct the public defender to refuse to accept or retain additional cases for representation by his office."

26. The National Legal Aid and Defender Association (NLADA) also has reviewed the issue of caseloads in public defender offices. After a careful study, that nationally recognized body adopted the same caseload standards for public defender offices across the country as were set out in NAC. NLADA concluded its study saying, "No defender office or defender attorney shall accept a workload, which by reason of the excessive size thereof, threatens to deny clients due process of law or places the office or attorney in imminent danger of violating any ethical canons governing the practice of law."

NLADA Standards for Defender Services Part IV.1.

27. The American Council of Chief Defenders (ACCD) is a national community of public defense leaders dedicated to securing a fair justice system and ensuring high-quality legal representation for people facing a loss of life, freedom, or family. On August 24, 2007, the ACCD issued a resolution concerning caseloads and workloads in institutional public defender offices. The ACCD stated:

¹⁰ Standard 13.12 defines a "case" as "a single charge or set of charges concerning a defendant (or other client) in one court in one proceeding."

The ACCD recommends that the public defender and assigned counsel caseloads not exceed the NAC recommended levels of 150 felonies, 400 non-traffic misdemeanors, 200 juvenile court cases, 200 mental health act cases, or 25 non-capital appeals per attorney per year. These caseload limits reflect the maximum caseloads for fulltime defense attorneys, practicing with adequate support staff, who are providing representation in cases of average complexity in each case type specified. If a defender or assigned counsel is carrying a mixed caseload, which includes cases for more than one category of cases, the standard should be applied proportionally. (For example: under the NAC standards a lawyer who has 75 felony cases should not be assigned more than 100 juvenile cases and ought to receive no additional assignments).

In public defense systems in which attorneys are assigned to represent groups of clients at court calendars in addition to individual case assignments, considerations should be given to adjusting the NAC standards appropriately, recognizing that preparing for and appearing at such calendars requires additional attorney time.

An ACCD position paper, also dated August 24, 2007, states as follows:

Excessive public defender caseloads and workloads threaten the ability of even the most dedicated lawyers to provide effective representation to their clients. This could mean that innocent people are wrongly convicted, or that persons who are dangerous and who need treatment, languish in prison at great cost to society. It can also lead to the public's loss of confidence in the ability of our courts to provide equal justice.

ACCD Statement on Caseloads and Workloads at 2-3 (footnote omitted).

28. Perhaps most relevant to this Petition are the caseload standards that The Spangenberg Group developed based on the results of the Weighted Caseload Study. Spangenberg recommended that these standards, which were a critical by-product of the extensive caseload study ordered by the Tennessee legislature, be used to evaluate caseloads in all thirty-one of Tennessee's judicial districts. The caseload standards recommended by Spangenberg, which are higher than other national standards, were:

Capital /1 st Degree Murder	.5
Appeals	25
Felony	233
Misdemeanors	500
Probation Violations	795

- B. Attorneys, including public-defender managers and staff attorneys, have an ethical obligation to refuse to accept caseloads that prohibit them from providing legal representation that does not meet constitutional and professional standards.**

29. Norman Lefstein, Professor of Law and Dean Emeritus at the Indiana University School of Law-Indianapolis, and Georgia Vagenas, Assistant Counsel to the American Bar Association's Standing Committee on Legal Aid and Indigent Defense, authored an article in the December 2006 issue of *The Champion*, a monthly magazine of the National Association of Criminal Defense Lawyers (NACDL), titled *Excessive Defender Caseloads: ABA Ethics Committee Weighs In*. Professor Lefstein states:

The most influential ethics body in the United States has now told criminal defense lawyers that having an excessive number of cases can never be an excuse for failing to provide "competent" and "diligent" representation to their clients.

Id. at 10.

American Bar Association (ABA), Ethics Committee Formal Opinion 06-441, sets out the ethical responsibilities of both the lawyer-manager in an institutional public defender office and the individual staff attorney within that same office regarding excessive caseloads. The ABA opinion acknowledges that

an attorney has a duty to be both competent and diligent and also to communicate with the client concerning the representation. These obligations require an attorney to keep abreast of changes in the law; adequately investigate, analyze, and prepare cases; act promptly on behalf of clients; communicate effectively on behalf of and with clients; control workloads so each matter can be handled competently; and, if a lawyer is not experienced with or knowledgeable about a specific area of the law, either associate with counsel who is knowledgeable in the area or educate herself about the area.

30. ABA Ethics Opinion 06-441 sensibly recognizes that national standards as to annual numeric caseload limits cannot be controlling. As the opinion explains, whether a lawyer's caseload is excessive "depends not only on the number of cases, but also on such factors as case complexity, the

availability of support services, the lawyer's experience and ability, and the lawyer's non-representational duties."

31. In the aforementioned article, Professor Lefstein points out that:

After noting that "[a] lawyer's primary duty is owed to existing clients," [ABA Ethics Opinion 06-441] suggests the courses of action defenders should follow when the duty is threatened by an excessive caseload. This can occur (1) when a lawyer's cases are assigned by the court and (2) when cases are assigned to the lawyer by the public defender's office or other source, such as a law firm. In the first situation, when a caseload has become excessive or additional cases will render the lawyer's workload excessive, appropriate actions include asking that the court not assign new cases until the caseload permits the rendering of competent representation. Alternatively, if the matter cannot be resolved through such a request, "the lawyer should file a motion with the trial court requesting permission to withdraw from a sufficient number of cases to allow the provision of competent and diligent representation to the remaining clients."

Lefstein & Vagenas, *supra*, at 12 (footnotes omitted).

32. Tennessee Supreme Court Rule 13 is in accord with ABA Ethics Opinion 06-441, in that, as Rule 13 acknowledges, an attorney may not compromise either the constitutional duty owed to the client or the lawyer's professional standards regarding workloads. Rule 13, Section 1(e)(4)(D), states, "The court shall not make an appointment if counsel makes a clear and convincing showing that adding the appointment to counsel's current workload would prevent counsel from rendering effective representation in accordance with constitutional and professional standards."

33. Constitutional and professional standards require lawyers representing citizens accused of crimes to meet certain performance measures. The ABA Standards for Criminal Justice--The Defense Function, demand that lawyers:

- a. Establish a relationship of trust and confidence with the accused;
- b. Communicate with the client, discussing, among other things, the objectives of the representation;
- c. Ensure privacy essential for confidential communication between defense counsel and client;

- d. Seek to determine all relevant facts known to the accused as soon as practical;
- e. Inform the accused of all his/her rights at the earliest possible opportunity and take all necessary actions to vindicate such rights;
- f. Consider all procedural steps, which in good faith may be taken on behalf of the client to include:

- Seeking pre-trial release where appropriate;
- Obtaining psychiatric examinations when needed;
- Moving to change venue or moving for a continuance when needed;
- Moving to suppress illegally obtained evidence;
- Moving to sever jointly charged defendants.

- g. Conduct a prompt investigation of the circumstances of the case, exploring all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction;
- h. Avoid interviewing a prospective witness except in the presence of a third person;
- i. After being informed fully of the facts and the law, defense counsel should advise the accused with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome. Defense counsel should explore the possibility of an early diversion of the case from the criminal process through the use of other community agencies;
- j. Refrain from recommending to a defendant to accept a plea unless appropriate investigation and study of the case has been completed, including an analysis of controlling law and the evidence likely to be introduced at trial;
- k. Keep the accused advised of developments arising out of plea discussions conducted with the prosecutor; and, promptly communicate and explain to the accused all significant plea proposals made by the prosecutor.

ABA Criminal Justice Section: Defense Function General Standards.

34. Caseload volume is also addressed by the Tennessee Supreme Court Rule 8, Rules of

Professional Conduct:

- a. Tenn. Sup. Ct. R. 8, RPC 1.1, Competence. A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.
- b. Tenn. Sup. Ct. R. 8, RPC 1.3, Diligence. A lawyer shall act with reasonable diligence and promptness in representing a client.

- c. Tenn. Sup. Ct. R. 8, RPC 1.7(b), Conflict of Interest: General Rule. A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client . . . , unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents in writing after consultation.
- d. Tenn. Sup. Ct. R. 8, RPC 1.16(1), Declining and Terminating Representation. . . . [A] lawyer shall not represent a client . . . if the representation will result in a violation of the Rules of Professional Conduct
- e. Tenn. Sup. Ct. R. 8, RPC 1.16, Declining and Terminating Representation. . . . Comment (3): When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority.

V. Affidavits and Resolutions

Attached to this Petition, and by reference incorporated herein, are the following Affidavits from private practitioners who practice before the Knoxville Bar: Mr. David Eldridge; Mr. Tom Dillard; Mr. James A.H. Bell; Professor Jerry Black; and Mr. Don Bosch.¹¹ In addition, a Resolution from the American Council of Chief Defenders ("ACCD") is attached to this Petition, and by reference incorporated herein.¹² Finally, attached to this Petition, and by reference incorporated herein as well, are affidavits of each member of the legal staff of the Knox County Public Defender's Office.¹³

VI. Conclusion

35. Under current caseloads at the P.D. Office, conscientious and dedicated lawyers are forced to severely compromise their professional responsibilities and duties owed to clients. As a result, our system of justice and the clients we have sworn to represent suffer. Additional appointments to the current workload decrease even further the quality of service that appointed lawyers can provide.

¹¹ See individual Affidavits attached as Exhibits 5, 6, 7, 8, and 9 respectively to this Petition.

¹² See Resolution of the ACCD attached as Exhibit 10 to this Petition.

¹³ See individual attorney Affidavits from the legal staff of the Knox County Public Defender's Office attached as Exhibits 11 through 33 to this Petition.

When the court appoints the public defender to more cases than can be handled in the time available because of excessive caseloads, some of the cases will not and cannot be properly prepared. Preparation takes time. Even in misdemeanor cases, competent preparation requires an investment of time. When there is not enough time to properly investigate and prepare the defendant's case, counsel cannot meet the constitutionally required standard of effective assistance of counsel. Although physically present, whether in a preliminary hearing or at trial, the lawyer will not be prepared to provide to the appointed client the effective assistance of counsel guaranteed by the United States and Tennessee Constitutions.

A party is entitled, by our bill of rights, when accused, to be heard by counsel. This means more than a simple argument before a jury. It guaranties [sic], that in the preparation of his defense, he is entitled to the advice and assistance of counsel that his defense may be properly shaped, so that his innocence may be made to appear, if the facts shall so warrant. It would be a cruel mockery to follow the letter, and give counsel for mere argument, when, for want of that counsel's assistance, there may be no case to argue, and the argument be a useless ceremonial.

State v. Poe, 76 Tenn. 647, 654 (1881).

As demonstrated in this Petition, the current caseloads of the Knox County Public Defender Office in all divisions of the Knox County General Sessions Court greatly exceed all recommended national caseload standards. The result is that the attorneys in the P.D. Office are forced to compromise their professional and ethical obligations to clients. Excessive caseloads deny indigent citizens their constitutional right to the effective assistance of counsel and, ultimately, to justice.

Our Tennessee Supreme Court and other national bodies, including the American Bar Association Ethics Committee, have instructed or opined that our courts and all lawyers, including public-defender managers and staff attorneys, should not have excessive caseloads assigned to them "if counsel makes a clear and convincing showing that adding the appointment to counsel's current

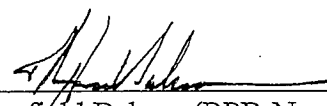
workload would prevent counsel from rendering effective representation in accordance with constitutional and professional standards."

The P.D. Office respectfully asks that the Knox County General Sessions Court find the current caseloads of the P.D. Office in the Misdemeanor Division to be excessive, and, pursuant to Supreme Court Rules 13 and 8, immediately suspend further appointments in the Misdemeanor Division.

Respectfully submitted,

CHAMBLISS, BAHNER & STOPHEL, P.C.

By: _____


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STATE OF TENNESSEE)
COUNTY OF KNOX)

I, Mark E. Stephens, the above-named Petitioner, being duly sworn, depose and say that the statements in the foregoing Petition are true to my knowledge except as to matters therein stated to be on information and belief, and these matters I believe to be true.

Mark E. Stephens
Mark E. Stephens

Sworn to and subscribed before me this 14 day of March, 2008.

Randal Sims
Notary Public
My Commission expires: 12/4/2011

